Supreme Court, U.S.
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No. 91-173

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

HARNISCHFEGER CORPORATION,

Petitioner,

v.

HARBOR INSURANCE COMPANY,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

J. RIC GASS
Counsel of Record
CHARLES G. MARIS
KASDORF, LEWIS & SWIETLIK, S.C.
1551 South 108th Street
Milwaukee, Wisconsin 53214
(414) 257-1055

Counsel for Respondent

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED

1. Whether a federal court, sitting in diversity, must follow a state's law which prohibits the citation of unpublished opinions which have no precedential value.

2. Whether the Seventh Circuit Court of Appeals correctly applied Wisconsin law concerning restitution of payments made by mistake.

LIST OF PARTIES

The parties to the proceeding below were the petitioner Harnischfeger Corporation and the respondent Harbor Insurance Company.

RULE 29.1 STATEMENT

Harbor Insurance Company was sold on December 14, 1990 to NAC Reinsurance Corporation. All of Harbor's insurance policy obligations which existed prior to December 14, 1990 have been fully assumed by Continental Insurance Company. Continental Insurance Company is a subsidiary of The Continental Corporation. The following companies are non-wholly owned subsidiaries of Continental Insurance Company and The Continental Corporation: Underwriters Re Acquisition Corporation, First Insurance Co. of Hawaii, Ltd., Saudi Continental Insurance Co., Ltd., Associated Aviation Underwriters, Accord Holdings, Inc., First Fire and Marine Insurance Co., Ltd., United Continental Insurance Stn Bhd, Malayan Overseas Insurance Corp., Lombard General Insurance Co., Ltd., Asia Insurance Co. Limited, Intercontinental Seguradora S.A. and Connaught Insurance Co. Limited.

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STATUTES INVOLVED

28 U.S.C. sec. 1652. State Laws As Rules of Decision

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

Wisconsin Rule of Appellate Procedure 809.23(3)

An unpublished opinion is of no precedential value and for this reason may not be cited in any court of this state as precedent or authority, except to support a claim of res judicata, collateral estoppel, or law of the case.

Wisconsin Rule of Appellate Procedure 809.24(4)

A person may at any time request the court to have an unreported opinion published in the official reports. A copy of the request shall be served pursuant to s. 809.80 on the parties to the appeal or other proceeding in which the opinion was filed.

Seventh Circuit Rule 53(b)

(b) *Publication.* The court may dispose of an appeal by an order or by an opinion, which may be signed or *per curiam.* Orders shall not be published and opinions shall be published.

(1) "Published" or "publication" means:

(i) Printing the opinion as a slip opinion;

(ii) Distributing the printed slip opinion to all federal judges within the circuit, legal publishing

companies, libraries and other regular subscribers, interested United States attorneys, departments and agencies, and the news media; and

(iii) Unlimited citation as precedent.

(2) Unpublished orders.

(i) Shall be typewritten and reproduced by copying machine;

(ii) Shall be distributed only to the circuit judges, counsel for the parties in the case, the lower court judge or agency in the case, and the news media, and shall be available to the public on the same basis as any other pleading in the case;

(iii) Shall be available for listing periodically in the Federal Reporter showing only title, docket number, date, district or agency appealed from with citation of prior opinion (if reported), and the judgment or operative words of the order, such as "affirmed," "enforced," "reversed," "reversed and remanded," and so forth;

(iv) Except to support a claim of res judicata, collateral estoppel or law of the case, shall not be cited or used as precedent.

(a) in any federal court within the circuit in any written document or in oral argument; or

(b) by any such court for any purpose.

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Unfortunately, the petitioner's statement of the case is slanted and misleading. Harbor Insurance Company (hereinafter "Harbor") totally disagrees with the characterizations, facts and innuendos set forth in paragraphs three and four of Harnischfeger Corporation's (hereinafter "Harnischfeger") statement of the case in its Petition for Writ of Certiorari. Most importantly, Harnischfeger fails to point out to this Court in its petition that the insurance

policy in this case is substantially different from the insurance policy in the unpublished *Harnischfeger-Republic* case on which it has based its petition. A short and accurate statement of the case follows.

The complaint in this matter was filed on August 18, 1987. It alleged breach of contract, and the basic dispute between the two corporations was the interpretation of an insurance policy. Harnischfeger claims that Harbor owed certain monies to it under an excess policy of insurance for expenses paid by Harnischfeger but within Harbor's layer of coverage.

Harbor answered the complaint admitting the existence of the insurance policy, but denied any monies were due. Harbor filed a Counterclaim and an Amended Counterclaim. These counterclaims sought reformation of the insurance contract and reimbursement for payments mistakenly made prior to the exhaustion of the underlying limits by indemnity payments.

Both parties filed motions for partial summary judgment in October 1988. These motions asked the district court to resolve the insurance coverage dispute concerning the point at which the excess insurance policy was to "attach" or "kick in". Harnischfeger asserted that the excess policy kicked in when the underlying policy limit was met by both indemnity payment of claims and legal fees/defense costs incurred in defending these claims. Harbor moved asking the Court to declare that coverage under the excess policy would kick in only after indemnity payments were made up to the underlying policy limit without regard to legal fees and the defense costs incurred in defending the claims that fell within the underlying limits.

The district court issued a decision and order dated March 8, 1989 which denied Harnischfeger's motions and

granted Harbor's motion. The effect of that decision and order was to declare that the excess insurance policy was to kick in when the underlying policy limit was exhausted by indemnity payments only without regard to legal fees and defense costs. Harnischfeger moved the court to reconsider its decision and order of March 8, 1989 on the basis of an unpublished decision of the Wisconsin Court of Appeals and the court denied that motion.

Harbor moved the court for summary judgment on its counterclaims on January 2, 1990. The counterclaims sought restitution for monies paid due to the mistaken impression Harbor received from Harnischfeger that the underlying aggregate limit had been reached by indemnity payments only when, in fact, that limit had been reached by combining indemnity payments plus legal fees and defense costs paid in defending the claims falling within the underlying limits. The district court, by decision and order of March 23, 1990, denied Harbor's motion for summary judgment and dismissed Harbor's counterclaims. The case was disposed of by these motions, no trial was had, and a final judgment was entered by the clerk on April 30, 1990, which dismissed the Complaint and the Counterclaims.

Both parties timely appealed to the Seventh Circuit. The Seventh Circuit affirmed the district court on the insurance coverage issue stating that legal fees and defense costs could not be combined with indemnity claim payments to reach the underlying policy limit. However, the Court of Appeals reversed the district court on the mistake issue and stated that Harbor could recover payments it had mistakenly made for settlements and judgments and remanded for computation of the sums owed Harbor.

As this case progressed, Harnischfeger petitioned the Publication Committee of the State of Wisconsin Court of Appeals for publication of the *Harnischfeger-Republic*

case. Its petition was denied. The Wisconsin Supreme Court had earlier refused to review the unpublished Court of Appeals decision.

SUMMARY OF THE ARGUMENT

This case does not present issues of significant importance to warrant further review by the United States Supreme Court. Harnischfeger is simply challenging the court of appeals' state law determination which is rarely, if ever, an appropriate subject of this Court's review. Further review of this case is not warranted.

Federal courts, sitting in diversity, must follow state selective publication and non-citation rules, otherwise the doctrine of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) will be violated. The unpublished decision at issue is entitled to no precedence in Wisconsin and can not be cited pursuant to Wisconsin law and the federal courts must follow the same rule pursuant to *Erie*. The district court and court of appeals correctly refused to give precedential effect to the unpublished decision because of the Wisconsin non-citation rule and because the insurance policy in the unpublished decision is significantly different from the one at issue in this case.

Wisconsin clearly allows one to receive restitution if one has made a mistaken overpayment due to an innocent mistake of law or fact entertained by both parties. The court of appeals correctly followed this law and did not usurp its power. Regardless of whether one classifies the mistake made as one of fact or one of law, the court of appeals has correctly allowed Harbor to receive restitution of the overpayments.

ARGUMENT

I.

THE ISSUES PRESENTED ARE NOT SUFFICIENTLY IMPORTANT TO WARRANT REVIEW BY THIS COURT

The grant of a Writ of Certiorari requires the exercise of this Court's discretionary jurisdiction. "A review of Writ of Certiorari is not a matter of right but of sound judicial discretion. A Petition for a Writ of Certiorari will be granted only when there are special and important reasons therefor." Sup. Ct. R. 10.1. This case is not of sufficient importance in the overall structure of the law to merit review by this Court.

In its effort to convince the court of the importance of the case, the petitioner has greatly overstated the reach of the Seventh Circuit's decision. This case is simply a dispute between an insurer and an insured which required the interpretation of the insurance policy and Wisconsin law. This court has stated, ". . . that, standing alone, a challenge to state law determinations by the court of appeals will rarely constitute an appropriate subject of this court's review." *Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983). Harnischfeger is simply attacking the Seventh Circuit's construction of Wisconsin law as it relates to the insurance policy and thus this case is not the proper subject for review by this Court.

Also, it does not help Harnischfeger's request to state that an issue in the case, the effect of state publication and non-citation rules in federal court, has not been resolved or addressed by this Court. The fact that a certain issue has never been addressed by this Court is not a recognized basis for the granting of a Petition for Writ of Certiorari.

As Harnischfeger notes in its brief, twenty-six states and all thirteen federal circuits had selective publication rules by 1989. Beyler, *Selective Publication Rules: An Empirical Study*, 21 Loy U. Chi. L.J. 1, 3 (1989). Although these selective publication rules have a common purpose, the rules are not all the same. *See Id.* at 3-6. Some rules prohibit citation altogether, while others say the case is not precedential. Some rules merely discourage citation. Although there has been some confusion by some circuits, for example, the citation of cases with no or limited precedential value, this can be expected when there are different rules. The selective publication rules and non-citation rules are created by the particular state and application of such rules must be left up to the particular states and the applicable court on a case-by-case basis. It is foolhardy to think that this court could announce a rule, with respect to state non-citation rules, as petitioner seems to be requesting in its petition, which would be fair and appropriate to all relevant jurisdictions and under all circumstances. Each state has the right to its own selective publication rule and the federal courts should apply such rules in diversity cases as a state court would.

Harnischfeger states that this Court's direction is needed to determine whether state non-citation rules must be followed in a diversity case. The answer to that question was decided long ago in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). As this Court stated, "the nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a state court a block away should not lead to a substantially different result." *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945). If a federal court did not have to follow a state non-citation rule, as Harnischfeger hopes for, then *Erie*

R. Co. v. Tompkins would have no further effect and would have to be overruled. This Court stated only last year that, "the *Erie* rule remains a vital expression of the federal system and the concomitant integrity of the separate states." *Ferens v. John Deere Co.*, 494 U.S. 416 (1990). Stated simply, if a state court is forbidden from relying upon and citing to an unpublished opinion, the federal court should be subject to the same rule, otherwise the *Erie* principle is violated. Also, encouragement of forum shopping would be sparked by a rule stating federal courts do not have to follow state non-citation rules.

Although state selected publication and non-citation rules are interesting and somewhat controversial, the issue is not of such significant importance to warrant review by this Court. Furthermore, this Court gave us guidance, over fifty years ago in *Erie R. Co. v. Tompkins* as to whether or not state non-citation rules should be followed. The answer is a simple yes.

II.

THE SEVENTH CIRCUIT CORRECTLY RESOLVED THE NON-CITATION ISSUE AND THE CORRECT RESULT WAS REACHED

The district court refused Harnischfeger's request to have it reconsider its decision in favor of Harbor which correctly determined the attachment point of the insurance policy, based upon the unpublished decision from the Wisconsin Court of Appeals in *Republic Insurance Co. v. Harnischfeger Corp.*, No. 88-1817 (Wis. Ct. App. June 21, 1989), *review denied*, 449 N.W.2d 276 (1989). The district court denied the request on two separate grounds. The first ground was that the decision was unpublished, without precedential value, and should not even be cited

to. The second ground was that the language of the insurance policies were different.

The court of appeals stated that the analysis of the district court was correct. The court of appeals stated that the unpublished decision did not control for two reasons. The first reason was that the Republic Insurance policy contains language which is different from the Harbor policy. The second reason was that the decision was unpublished and entitled to no precedential value.

In Wisconsin, unpublished opinions have no precedential value and are not to be cited as precedent or authority except for a claim of res judicata, collateral estoppel or law of the case. Section 809.23(3), Wis. Stats. Wisconsin lawyers are admonished under pain of possible sanctions not to even cite unpublished opinions. *See, Cole v. Young*, 817 F.2d 412, 420 (7th Cir. 1987), citing *Tamminen v. Aetna Casualty & Surety Co.*, 109 Wis. 2d 536, 327 N.W.2d 55 (1982). *See also City of Madison v. Lange*, 140 Wis. 2d 1, 6 n.2, 408 N.W.2d 763 (Ct. App. 1987) and *Hagen v. Gulrud*, 151 Wis. 2d 1, 8, 442 N.W.2d 570 (Ct. App. 1989) where the courts fined attorneys for citing to unpublished opinions. The Seventh Circuit, in *Cole*, recognized the lowly status of unpublished opinions. *See, Cole, supra* at 420. Finally, the Seventh Circuit, in this case, made the correct conclusion where it stated, "a non-case for Wisconsin's own purposes is a non case in federal courts under *Erie.*" *Harnischfeger Corp. v. Harbor Insurance Co.*, 927 F.2d 974, 976 (7th Cir. 1991). As noted above, this is the correct result if *Erie* is to remain vital.

Furthermore, Wisconsin has recently reviewed its non-citation rules and has decided not to change it. In June of 1990, the Wisconsin Supreme Court denied the State Bar of Wisconsin's petition, which requested a rule change

which would allow unpublished opinions to be cited for persuasive and informational purposes. The Wisconsin Supreme Court stated that the proposal would not correct inequitable access to unpublished decisions, would not correct other associated problems, and it also reasoned that lower courts might give unpublished opinions too much worth. *See, Amendment of Section (Rule) 809.23(3)*, 155 Wis. 2d 832, 456 N.W.2d 783 (1990). Therefore, there is absolutely no question that an unpublished Wisconsin opinion is of no precedential value and must not be cited as precedent or authority except to support a claim of res judicata, collateral estoppel or law of the case.

The Seventh Circuit also has a non-citation rule to unpublished opinions and orders. Pursuant to Seventh Circuit Rule 53, an unpublished order of that court may not be cited or used as precedent in any federal court within that circuit except to support a claim for res judicata, collateral estoppel or law of the case. The reasons for the non-citation rule are to reduce the proliferation of opinions when the publication criteria aren't met. To thus allow an unpublished opinion to be cited as precedent would ignore both the Wisconsin rule and its underlying principles, as well as the rule and underlying principles of Seventh Circuit Rule 53.

Other circuits have also recognized that unpublished opinions are not precedential. *See, In re Leimer*, 724 F.2d 744 (8th Cir. 1984), *Exxon Co. v. Banque de Paris et des Pays-Bas*, 889 F.2d 674 (5th Cir. 1989), *cert. denied* ____ U.S. ____, 110 S. Ct. 3230 (1990). The decision not to publish an opinion usually represents the court's view that the case is without substantial value for precedence purposes.

Wisconsin allows any person at any time to request the court to have an unreported opinion published in the official reports. Section 809.23(4), Wis. Stats. The petitioner,

Harnischfeger, did request the Wisconsin Court of Appeals, by way of motion, to publish the *Republic Insurance Co. v. Harnischfeger Corp.* case. The court of appeals denied Harnischfeger's publication request and this is further support for the result reached below.

Also, it must be noted that Harnischfeger has misquoted *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967). Harnischfeger states at pages 9-10 of its petition, that the *Estate of Bosch* says that all state decisions at a minimum must be given proper regard. The case does not say that, what this court stated is that proper regard must be given to relevant rulings. *Id.* at 465. A case that is not precedential at all can never be considered a relevant ruling to be given proper regard.

Therefore, the Seventh Circuit's decision not to consider the unpublished decision as controlling precedence was correct. Wisconsin and the Seventh Circuit both have non-citation rules to unpublished opinions. As noted above, if the *Erie* rule is to remain vital, the federal courts must follow the particular state non-citation rules. If the federal courts are not required to follow state non-citation rules, the *Erie* rule will be substantially eroded and forum shopping will be greatly encouraged. Furthermore, the Harbor policy and Republic policy have different terms and both the district court and court of appeals recognized this and so the non-citation issue is not as important as Harnischfeger would have one believe.

III.

THE SEVENTH CIRCUIT CORRECTLY APPLIED WISCONSIN LAW CONCERNING MISTAKEN PAYMENTS

Harnischfeger asserts, in its petition, that payments made because of a mistake of law cannot be recovered

under Wisconsin law. Harnischfeger also asserts that the classification of the mistake is extremely important and controlling. These assertions are not correct and misstate Wisconsin law.

Wisconsin follows the rule which states that the classification of the mistake is not controlling. In *In re Brat*, 257 Wis. 447, 43 N.W.2d 817 (1950), the Wisconsin Supreme Court stated that one will not be allowed to enrich himself unjustly at the expense of another by reason of an innocent mistake of law or a fact entertained by both parties. The Wisconsin Supreme Court specifically stated:

> It has been said that the important question is, after all, whether the case falls within the fundamental principle of equity that no one shall be allowed to enrich himself unjustly at the expense of another by reason of an innocent mistake of law or a fact entertained by both parties.

Id. at 453.

Another Wisconsin case which recognizes the return of mistaken payments made under a mistake of law is *City of Milwaukee v. Milwaukee County*, 27 Wis. 2d 53, 133 N.W.2d 393 (1965). Harnischfeger's conclusion that Wisconsin law does not allow recovery for mistaken payments made because of a mistake of law is simply wrong and misleading.

Harnischfeger cited three pre-1906 Wisconsin cases, at page 15 of its petition, for the proposition that under Wisconsin law payments made because of a mistake of law cannot be recovered. Although the holdings of *Gage v. Allen*, 89 Wis. 98, 61 N.W. 361 (1894) and of *Birkhauser v. Schmitt*, 45 Wis. 316 (1878) are consistent with such a rule, none of these three cases, cited by Harnischfeger, announce a black-and-white rule which says payments made

because of a mistake of law cannot be recovered. In fact, the actual rule is set forth in *In re Brat* quoted above that either a mistake of law or fact will allow restitution.

Harnischfeger does correctly point out that in Wisconsin a party who has expended money by mistake of fact may ordinarily recover such sum in an action for money had and received. *See, Amalgamated Association of Street Electric Railway & Motor Coach Employees v. Danielson*, 24 Wis. 2d 33, 128 N.W.2d 9 (1964). Harbor has maintained in both the district court and court of appeals that the mistakes made by it were mistakes of fact. Harbor's mistake in this case was relying on its own insured's factual statements that the underlying policy was exhausted triggering coverage under Harbor's excess policy. Accordingly, Harbor has been correctly allowed to recover its mistaken payments as the mistakes made were mistakes of fact.

Therefore, the Seventh Circuit has properly allowed Harbor to recover the mistaken payments because the mistakes made were mistakes of fact. Even if the mistakes Harbor made were classified as mistakes of law, this does not bar recovery. The Seventh Circuit has not thrown out, as Harnischfeger suggests, relevant Wisconsin law. To the contrary, the Seventh Circuit has correctly followed Wisconsin law and it also correctly notes that Harnischfeger's argument relied primarily on a few ancient cases that were impliedly overruled by the more modern cases, such as *In re Brat, supra*. There was no usurpation of power by the court of appeals as Harnischfeger suggests and so there is no need to review this matter, as this Court generally defers to the determination of state law by the court of appeals. *Cort v. Ash*, 422 U.S. 66, n.6 (1975).

CONCLUSION

The Petition for Writ of Certiorari does not present any issue which warrants review by this Court. The issues presented are questions of state law and the Seventh Circuit Court of Appeals has correctly applied the law of the State of Wisconsin. Harbor, therefore, respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

J. RIC GASS
Counsel of Record
CHARLES G. MARIS
KASDORF, LEWIS & SWIETLIK, S.C.
1551 South 108th Street
Milwaukee, Wisconsin 53214
(414) 257-1055

Counsel for Respondent